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No. 83-668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYFORD C. PACE,
Petitioner,

v.

SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the United States Court of Appeals for the Eleventh Circuit which held, after careful consideration and analysis of a complete factual record and applicable authorities, that the quantum and quality of evidence presented by Petitioner was insufficient under any available legal theory to establish a prima facie case of alleged age discrimination?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Southern Railway Company respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.[1]

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[1] In accordance with the provisions of Sup. Ct. R. 28.1, the following is a listing of the parent company, subsidiaries and affiliates of Southern Railway Company: Norfolk Southern Corporation; Norfolk and Western Railway Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Alabama Great Southern Railroad Company; New Orleans Terminal Company; Georgia Southern & Florida Railway Company; St. Johns River Terminal Company; Tennessee, Alabama & Georgia Railway Company; Central of Georgia Railroad Company; Interstate Railroad Company; Atlantic & East Carolina Railway Company; Live Oak, Perry & South Georgia Railway Company; Lamberts Point Barge Company, Inc.; Norfolk Southern Marine Services, Inc.; Norfolk & Portsmouth Belt Line Railroad Company; and NS Transportation Brokerage Corporation.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Pace v. Southern Railway System*, 701 F.2d 1383 (11th Cir. 1983). It is reproduced at Appendix B-20 through B-34 of the Petition. The opinion of the United States District Court for the Northern District of Georgia is reported as *Pace v. Southern Railway System*, 530 F. Supp. 381 (N.D. Ga. 1981). That opinion is reproduced at Appendix A-9 through A-18 of the Petition.

JURISDICTION

The basis for invoking this Court's jurisdiction is 28 U.S.C. § 1254(1). The Eleventh Circuit opinion was issued on April 4, 1983, and a petition for rehearing on that decision was denied on June 2, 1983. (Petition, Appendix B-35)

REASONS FOR DENYING THE WRIT

I. Petitioner Has Failed To Establish Any Meritorious Reason For Granting A Writ Of Certiorari In This Case.

No reason exists for granting a writ of certiorari in this case. Petitioner does not (and cannot) contend that the decision of the Eleventh Circuit is in conflict with the decision of any other federal court of appeals on the same matter. Sup. Ct. R. 17.1(a). The Eleventh Circuit has not "decided an important question of federal law which has not been, but should be, settled by this Court," nor has it "decided a federal question in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1(c). The decision of this Court in *Lorillard v. Pons*, 434 U.S. 575 (1978), holding that a jury trial may be demanded as a matter of right in an age discrimination action, is in no way implicated by the decision of the Eleventh Circuit in this case.

Petitioner's apparent assertion that the Eleventh Circuit departed from the accepted course of judicial proceedings so as to call for an exercise of supervisory intervention by this Court is patently without merit. Far from "excluding" evidence as Petitioner claims, the Eleventh Circuit panel carefully considered Petitioner's arguments and the various theories available to him for establishing a prima facie case of age discrimination, ultimately concluding that the evidence of record failed to create any inference of age discrimination or to make out a prima facie case. The Petition does no more than express dissatisfaction with the fact that both the District Court and the Court of Appeals, having reviewed a complete factual record developed upon full discovery, having given due and deliberate consideration to all of Petitioner's arguments, and having applied proper legal standards, disagreed with Petitioner's contentions as to the "evidence" and ruled against him. Summary judgments are frequently granted in favor of defendants in age and other employment discrimination actions. The fact that Petitioner here has joined the list of other unsuccessful plaintiffs in this regard affords no basis for the granting of certiorari in this case. Petitioner seeks only to have this Court engage in the same review of the quantum and quality of the evidence which has gone before, and Respondent respectfully submits that no useful or valid purpose would be served by such an exercise.

II. The Petition For Writ Of Certiorari Is Untimely.

The Eleventh Circuit opinion was issued on April 4, 1983. Petitioner then moved for rehearing by the original panel, and the petition for rehearing was denied in an Order entered by the Eleventh Circuit on June 2, 1983. (Petition, Appendix B-35)

The Petition for Writ of Certiorari in this case was received by and filed with the Clerk of this Court as of

September 2, 1983.[2] The ninety day deadline for filing a Petition for Writ of Certiorari in this case, measured from the date of denial of the petition for rehearing in the Eleventh Circuit, expired on Wednesday, August 31, 1983. 28 U.S.C. § 2101(c); Sup. Ct. R. 20.4. Because the petition was not received by and filed with the Clerk of this Court until September 2, 1983, it was therefore not filed within the time prescribed by law and should be rejected. Sup. Ct. R. 20.2, 28.2.

CONCLUSION

For the foregoing reasons, Respondent Southern Railway Company respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ D. Robert Cumming, Jr.

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Dated: November 21, 1983

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[2] The Petition as originally submitted was received by the Clerk on September 2, 1983, but was returned to Petitioner for the correction of certain deficiencies under the Rules of this Court. The Petition was subsequently re-submitted and was deemed to have been filed and docketed as of September 2, 1983. No certificate of mailing under Sup. Ct. R. 28.2 accompanied either the original or the re-submitted Petition.